

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 UNITED STATES OF AMERICA,)
4 Plaintiff,) No. 3:17-cr-00068-MO
5 v.)
6 MICHAEL EDWARD BOWMAN,) April 11, 2018
7 Defendant.) Portland, Oregon
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15 Oral Argument

16 TRANSCRIPT OF PROCEEDINGS

17 BEFORE THE HONORABLE MICHAEL W. MOSMAN

18 UNITED STATES DISTRICT COURT CHIEF JUDGE
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APPEARANCES

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1 (P R O C E E D I N G S)

2 (April 11, 2018)

3 MS. MADDUX: Good morning, Your Honor. Donna Maddux
4 appearing on behalf of the United States. With me at the table
5 is my co-counsel, Rachel Sowray. We're here in the matter of
6 United States versus Michael Bowman. That's Case No. 17-cr-68.
7 Defendant is present. He's out of custody. With him today is
8 his attorney, Matthew Schindler.

9 We are scheduled today for oral argument on four
10 motions that were filed by defense counsel in this case. Two
11 of those motions are motions to dismiss Count 1 of the
12 indictment. A third is a motion to dismiss the entire
13 indictment, based on the Religious Freedom Restoration Act.
14 And finally the defendant has filed a motion to dismiss the
15 original indictment and to seal the docket entry.

16 The government is ready to proceed.

17 THE COURT: Thank you.

18 Yes, sir?

19 MR. SCHINDLER: Your Honor, I would simply confirm
20 what the government has to say about those various motions and
21 suggest maybe that we deal with arguments regarding the sealing
22 of the indictments first, then deal with statute of
23 limitations, joinder issues, substantive issues regarding the
24 indictment, and then finally deal with the RFRA and free
25 exercise for the arguments at the end.

1 But I will take these things in whatever order the
2 Court believes would be appropriate under the circumstances.

3 THE COURT: Thank you.

4 I have reviewed what's been submitted on the motion
5 to seal the indictment. I believe it not proper in this case
6 to seal the indictment, so I deny that motion.

7 I've also reviewed the pleadings, the arguments that
8 have been made in writing on the motion to dismiss Count 1 for
9 improper joinder. And I believe that one to be not well taken,
10 and I deny that motion.

11 That leaves the motion to dismiss Count 1 for statute
12 of limitations problems and the motion to dismiss the entire
13 indictment for First Amendment, RFRA issues.

14 So I'll take up the constitutional issue first and
15 give you my tentative views and then hear oral argument.

16 So I guess I'd start by saying that if -- if I were
17 writing on a blank slate in this case, then this would present
18 an interesting and challenging and difficult constitutional law
19 question to resolve in some ways. But I'm not writing on a
20 blank slate. There are -- there is a line of cases relevant to
21 the analysis that I have to take into account as a district
22 court. It's not as full a slate, meaning that there's not
23 quite as much controlling authority in the government's favor
24 as the government has suggested. I can't help but noting that
25 the government tells me that the cases prior to the Oregon case

1 of *Smith* are now applicable after *Burwell* by citing *Burwell*,
2 but specifically citing, without telling me so, the dissenting
3 opinion in *Burwell*. So that doesn't quite get you there.

4 And the second argument is that I ought to rely on
5 the Ninth Circuit's opinion in *Jenkins*. And that turns out to
6 be the Second Circuit's opinion in *Jenkins*.

7 So I still believe that to some degree the
8 progression of authority is a series of cases perhaps
9 culminating for our purposes in *Lee* that are called into
10 question, if not entirely overruled by *Oregon v. Smith*, and
11 then the impact of *Smith* on that line of cases is flip-flopped.
12 It's erased in *Burwell*. So if you go back to something like
13 the earlier pre-*Smith* test, I still think that's probably
14 correct.

15 And then, of course, that requires a balancing look
16 at the seriousness, the compelling nature or not of the
17 government's interest, and the narrowness of the means used to
18 accomplish that interest. And like a lot of questions in law,
19 that depends on what level of granular detail you use to
20 express the interest.

21 So here the parties have two different ways to
22 express the interest. One is what is the government's interest
23 in funding abortion. That's Mr. Schindler's expression of what
24 the government interest is that I should be taking a look at,
25 and then he notes that the federal government across time, at

1 least, if not simultaneously, speaks out of both sides of its
2 mouth on the question, and that undercuts the seriousness of
3 that government interest.

4 The United States suggests that in any challenge like
5 this that there could conceivably be many, there could be
6 conceivably thousands of ways to express an objection to the
7 revenue collection on religious freedom or other constitutional
8 grounds, but the real question is what is the government's
9 interest in the orderly collection of revenue.

10 And that seems to me, as an initial matter, the
11 correct way to state the government interest in play here,
12 although I don't think I'd come out differently even under
13 Mr. Schindler's expression of the government interest. But if
14 it's the orderly collection of revenue, you know, you look at
15 the opposite side of the equation, is the government
16 accomplishing that interest in a narrow, accommodating way.

17 So here at least what Mr. Schindler has suggested,
18 for example, as just an example of a narrower way to accomplish
19 that interest and still engage in funding it is a sort of an
20 opt-out provision, where people can agree to pay in for this
21 purpose if they choose to.

22 Of course the United States suggests that Mr. Bowman
23 has no authority for that suggested approach, but that makes
24 sense. It's a novel approach. There wouldn't be any authority
25 for it.

1 So point number one, I guess, is that's a narrower
2 way to accomplish the defense stated interest, but doesn't
3 really help much in the government's view of the stated
4 interest. That is, if the stated interest is the orderly sort
5 of neutral and tangle-free collection of revenue as much as
6 possible, without encumbering that collection with a lot of
7 add-ons, then the defense suggestion fails to allow the
8 government to accomplish that purpose.

9 So in total, then, I think the correct interest here
10 is the orderly collection of revenue, and I think as has been
11 suggested but not held by important Supreme Court cases on
12 this -- in this arena, that that can't be accomplished by
13 opening the door to an argument that has the potential to go on
14 and on in objecting to many large and small ways in which the
15 government spends money.

16 I think it's correct to note, as cases have noted,
17 that if the argument is that I object to the way the government
18 is spending money on this issue, that because the government
19 spends money across so many different things, that on almost
20 any issue where that objection could be raised, coming out the
21 other way would pose the possibility someone would have its
22 opposite. I object, you know, to spending money on the war,
23 and someone else could say, I object to not spending money on
24 liberating oppressed countries, you know, however you want to
25 phrase it. It becomes unworkable.

1 It's not a new idea, by the way, to object to -- to
2 pose objections to government revenue collection and spending
3 it on certain causes. I mean, the tradition of that sort of
4 objection is quite old in this country, and articulated
5 probably best by Henry David Thoreau in his essay on civil
6 disobedience. But the upshot of that essay was you make your
7 objection and you pay your price. You work for legislative
8 change, you work for policy change, but you can't reasonably
9 expect to be accommodated in that way on an argument that has
10 endless applications.

11 So my tentative views are that the motion to dismiss
12 the indictment under this body of law encapsulated in the First
13 Amendment and RFRA, as amended by RLUIPA and *Burwell*, ought to
14 be denied, but I'll hear you further, Mr. Schindler, if you
15 have anything further to add that you didn't put in writing.

16 MR. SCHINDLER: If I might just have a moment.

17 (There is a pause in the proceedings.)

18 MR. SCHINDLER: Your Honor, thank you for providing
19 me the Court's views on these issues at the outset, because I
20 think they're significant, challenging, and obviously impactful
21 on Mr. Bowman's life.

22 I understand that the Court believes that the
23 indictment shouldn't be sealed; that it's not appropriate. I
24 would like to just speak to that briefly because I just -- I'm
25 not grasping entirely why it wouldn't be appropriate to dismiss

1 entirely an indictment that the government has superseded and
2 acknowledged wasn't properly brought in the first place.

3 THE COURT: Are you talking about dismissing the
4 current iteration of the indictment or the former?

5 MR. SCHINDLER: The former.

6 THE COURT: Do you object to that in any way?

7 MS. MADDUX: No, Your Honor. We state in our motion
8 we do not.

9 MR. SCHINDLER: So that indictment will be dismissed,
10 and I understand the Court's view on the current indictment.

11 I also acknowledge that there is not a direct case,
12 law or statute that supports the defendant's request for an
13 indictment, but I would say -- and I'm prepared to present
14 Mr. Bowman's testimony on this issue -- that it's been
15 extraordinarily impactful. At least three different employers
16 have told him that the existence of the indictment itself is
17 the reason for denying him employment. And I understand that's
18 not a decision that you control or that the government
19 controls, but I fail to see what the broad public interest is
20 in an indictment alleging tax evasion as an individual by
21 Mr. Bowman that goes back, you know, nearly 20 years.

22 And so I think there is a basis, certainly, within
23 the context of the Court's supervisory powers to seal an
24 indictment under these circumstances, and so I would simply
25 present those issues to the Court.

1 With respect to the First Amendment and the RFRA
2 issues, I think that what *Hobby Lobby* represented was a reset,
3 and it's not clear to me at all from reading *Hobby Lobby* that
4 what Congress intended with the RFRA was simply to just return
5 to whatever the Supreme Court decisions were pre-*Smith*.

6 You know, what Alito says in *Hobby Lobby*, Congress
7 intended greater protections for religious freedoms and
8 religious rights than any cases had established in the past. I
9 mean, that's the way that I read his opinion in that case. And
10 I think if that's the case, then a line of cases suggesting
11 something different isn't particularly helpful to the analysis
12 in this particular case.

13 And I understand that, you know, it's a simple issue
14 to express an interest as broadly as possible -- we have an
15 interest in the uniform collection of taxes -- but at the same
16 time, Your Honor, there fundamentally has to be a point at
17 which that no longer enjoys deference, that no longer enjoys a
18 simple presumption that it's appropriate.

19 And so you're talking about -- this isn't -- I mean,
20 repeatedly I've had the government say, and now the Court has
21 said, oh, there's thousands of objections that people could
22 make. I don't see that. I don't see the thousands of
23 objections that people could legitimately make about government
24 expenditures. Expenditures for defense are specifically
25 provided for in the Constitution. That's a giant chunk of what

1 our federal government does and is supposed to do, but our
2 federal government itself says we have no interest in
3 eliminating unborn children. So what right does the government
4 have to supersede Mr. Bowman's fundamental rights to preserve
5 his own conscience, to protect himself?

6 And there's another element here that I think has
7 been lost, Your Honor, and I think there was an emphasis. The
8 RFRA doesn't just contemplate a result. It contemplates a
9 process. It contemplates an opportunity to have a discussion
10 with people about whether an accommodation is realistic.

11 I mean, so there's a fundamental element, a
12 fundamental problem with the notion that it just doesn't have
13 to accommodate him because it said so. I mean, we continually
14 assume that there's no way the government could do this, and
15 the Supreme Court says there's no way the government could do
16 this. Really? I mean, that's exactly the way my bar dues in
17 California are collected. The California State Bar was sued
18 under antitrust laws, they basically became a voluntary
19 organization, and now when I get my bill from them, it says:
20 Do you want to donate to a public interest law project? Do you
21 want to give three more dollars to support indigent defense?

22 So the notion that the United States Government isn't
23 capable of accommodating a core religious value, a core element
24 of the religious values of millions and millions of Americans
25 seems to me like we're -- you know, where is the evidence?

1 Where is the evidence of that? The government says so. But
2 I -- we're talking about \$500 million of trillions. We're
3 talking about a small expenditure.

4 And, again, I don't -- you know, I don't see where
5 this wave of people being able to come in and object to the
6 government on unrelated grounds has any even relevance under
7 the RFRA as it's been decided now. I mean, the very first
8 thing is you have to have a discussion about accommodation.
9 You can't just assume that accommodation can't be done. There
10 has to be proof. The government has to put someone on from the
11 IRS that says, you know what? We've thought about this, we've
12 considered it, we've looked into it and we've consulted with
13 people and it just won't work.

14 And so, you know, to me there's an element of process
15 in this that Mr. Bowman has fundamentally not enjoyed. When he
16 tried to discuss these issues with individuals and the IRS,
17 they laughed in his face and then took him to jail.

18 And so, you know, I think it's difficult to accept
19 that the line of cases that say you can't come in here as a
20 conscientious objector to war, you can't come in here as a
21 conscientious objector to Social Security are inapposite, are
22 different, represent something that doesn't have continuing
23 viability under the RFRA.

24 The people in Congress may not be geniuses, but
25 they're not morons. They knew what Title 26 was when they

1 wrote the RFRA. They certainly could have said in there,
2 listen, this doesn't apply to Title 26 or this doesn't apply to
3 what the government spends or anything else.

4 But those words are there and they say what they say,
5 and so I don't -- it's not just a result that's important about
6 the RFRA. It's a process. And what I think is before you haul
7 a man into federal court and threaten him with prison, that at
8 least someone should have a discussion with him about, hey,
9 listen, you know, these are important values and we understand
10 them and respect them, but we can't possibly do this.

11 And I just don't buy that there are thousands and
12 thousands and thousands of objections and this would open the
13 door and make it impossible for the government to ever collect
14 taxes. I just think that's just an assumption and not a fact.
15 And I think that under our system, with this law, a process has
16 to take place before a conclusion is reached, and I think
17 that's part of where the failure has come in this particular
18 case.

19 THE COURT: Thank you. I appreciate it.

20 MR. SCHINDLER: So I would also like to speak, when
21 appropriate, to the statute of limitations issue.

22 THE COURT: You'll get your chance.

23 MR. SCHINDLER: Okay.

24 THE COURT: (To Ms. Maddux) So I don't need to hear
25 from you. Thank you.

1 I affirm what I just said was a tentative ruling. I
2 appreciate Mr. Schindler's arguments. They're embodied in what
3 he submitted to the Court in writing, so I've tried to take
4 them into account. And so that is my holding then on the
5 motion to dismiss the indictment in its entirety.

6 The next issue is the motion to dismiss Count 1 for
7 statute of limitations grounds. And so Count 1 spans a
8 significant period of time, and the way -- the only way really
9 that it evades the statute of limitations problem, if it does,
10 raised by Mr. Schindler under Section 7201 is if -- I think
11 it's like January 2012 to fall of 2014, in a series of cashing
12 of mostly paychecks instead of depositing them, or at least
13 initially depositing them but taking the cash out instead of
14 leaving it with the bank, if that amounts to evasion.

15 So I'm going to use a shorthand to talk about that in
16 expressing my tentative views. I'll call taking your checks
17 and depositing them in your bank account and leaving them
18 there -- other than for just the normal pattern of having some
19 in savings and having some in checking and spending them on
20 your normal daily spending or monthly spending -- I'm going to
21 call that depositing checks.

22 And taking your checks and cashing them, which
23 technically is momentarily depositing them and then pulling
24 cash out, and pulling out most of the money so that little of
25 what you got in the checks remains in the account, I'm going to

1 call that cashing the checks. That's what I mean as a way of
2 shorthand.

3 So it has to be, for Count 1 to survive statute of
4 limitations, that Mr. Bowman's cashing of these checks instead
5 of depositing them represents some sort of evasion. And that's
6 a concept that has been defined by law also to fundamentally
7 mean some sort of concealment or misleading.

8 So we know -- if you can think of this as two ends of
9 a continuum, we know sort of what's clearly concealment and
10 evasion and misleading, and that's, you know, for example,
11 taking your checks and coming up with a phony name and
12 depositing them under a phony name or hiding them under a
13 different name offshore, maybe even taking the money and buying
14 assets with it and then hiding the assets. You buy a bunch of
15 gold or art somewhere and then you locate it at secret
16 locations all over. That's concealment. And the false name is
17 misleading, and it's concealment or misleading that is the sine
18 qua non of evasion.

19 And I think I know what's not evasion. I think
20 somebody who just makes the decision -- let's say from the
21 outset of their financial life, they make a decision I'm just
22 not going to use banks. Maybe they open an account, but they
23 don't keep a lot of cash in there. That's not concealment.

24 And even the decision later on, in my view, to change
25 that pattern -- someone cooks along through life with what you

1 might think of as the more typical banking practice, and then
2 somewhere along the way, they change their mind and they become
3 preppers, or some other reason, and they decide, well, I'm not
4 going to rely on banks so much and I'm going to keep most of it
5 in cash, and that's the only reason they're doing it. That's
6 not evasion. Nor is, for that matter, openly spending the
7 money. While it may obstruct collection efforts if you cash
8 your checks -- if you deposit your checks, put \$50,000 in the
9 bank through checks, and then you go out and spend most of it,
10 that may create other problems, it may even violate other laws,
11 but it's not a violation of Section 7201. It's not evasion to
12 spend the money in a way that makes it less available to the
13 collection efforts of the IRS if it's done openly.

14 So, in my view here, you need something more than
15 just the assertion that what happened here was this person
16 cashed his checks under his true name, through his own bank, in
17 his own account, the inference being that that will make it
18 harder than the simple measure of just seizing his bank account
19 for the federal IRS to get the money some day if it earns the
20 right to do so.

21 And it's also my view that switching your methods or
22 doing other things that might be open and non-fraudulent, not
23 misleading or concealing but just make it more difficult to
24 collect aren't evasion; that you need something more than a
25 switch. You have to be -- you might think of it as a switch

1 plus one other thing.

2 That might be timing. You might have always
3 deposited your checks, and then the taxing authority increases
4 its efforts or begins or increases its efforts to come after
5 you, and so you then start cashing your checks instead.

6 And that's the United States' argument here. I think
7 they at times seem to make the argument that just cashing your
8 checks, if you used to deposit them, is evasion. And in my
9 view, that's clearly not the case, let alone cashing your
10 checks as opposed to depositing them just as your normal
11 pattern. Neither of those are evasion.

12 But its real argument is that the taxing authorities
13 came after this man and so he switched his methods, and I can
14 take in the switch plus the timing. The timing is the plus one
15 above just switching from depositing to cashing, and the timing
16 tells me that it's evasion.

17 That might work. There is some plus one necessary,
18 and it might work to call it timing. There has to be some
19 evidence that makes it real evasion as opposed to just cashing.

20 And the problem raised in this case is that it's the
21 wrong taxing authority. As far as I can tell from this record,
22 the federal IRS really didn't change its conduct towards this
23 defendant in any way that can lead to the rational inference
24 that, step one, federal taxing authority makes a new move; step
25 two, defendant responds by starting to cash his checks instead

1 of deposit them, and therefore infer conclusion that he did it
2 to evade.

3 Instead, it's the state taxing authorities that are
4 temporally linked to the change in his financial behavior, and
5 in my view that doesn't work. Therefore, I'm tentatively
6 inclined to dismiss the indictment -- excuse me, Count 1 of the
7 indictment on statute of limitations grounds.

8 So, Ms. Maddux, since this tentative conclusion puts
9 the ball in your court, I'll start with you.

10 MS. MADDUX: And, Your Honor, Ms. Sowray is going to
11 address this particular issue.

12 THE COURT: Ms. Sowray, go ahead.

13 MS. SOWRAY: Thank you, Your Honor.

14 The government will present at trial a lot of
15 evidence concerning how Mr. Bowman evaded these taxes. The
16 evidence will include not just the evidence of what the bank
17 accounts were looking like --

18 THE COURT: Well, let me stop you there.

19 So the motion isn't to direct a verdict at trial; the
20 motion is to dismiss an indictment. So you've got to tell me
21 what's in the indictment that defeats the motion.

22 MS. SOWRAY: The IRS was making specific -- was
23 sending specific notices to Mr. Bowman at the same time that
24 the Oregon Department of Revenue was, so he was being put on
25 notice by both authorities that this is what was occurring.

1 THE COURT: Sure. But the IRS had been doing that
2 for many years, right?

3 MS. SOWRAY: Correct. Both had been doing so for
4 many years.

5 THE COURT: So what -- just before the time that
6 Mr. Bowman changed his financial behavior, what had changed in
7 the IRS's behavior from its prior multiyear practice with this
8 man?

9 MS. SOWRAY: The IRS had sent a notice just about two
10 months prior to the sweep in January, per their 45-day notice,
11 to Mr. Bowman. So there was reason to believe that he
12 understood this to be the authority of the IRS doing it.

13 Furthermore, the fact that one authority did it and
14 they both were saying they were going to do it, goes to looking
15 at what his understanding was. There isn't evidence saying he
16 only understood that the Department of Revenue of the State of
17 Oregon was doing this, but that there is reason to show that he
18 understood that both were looking to do this, now they were,
19 and now he was going to take action to evade both.

20 THE COURT: Where in the indictment does it say that
21 he -- do you aver that that was his mental understanding of
22 what was going on?

23 MS. SOWRAY: If I can just have a moment, Your Honor.

24 (There is a pause in the proceedings.)

25 MS. SOWRAY: Your Honor, we say at the end of both B

1 and C --

2 THE COURT: You're talking about paragraph 17?

3 MS. SOWRAY: Yes, Your Honor. I apologize.

4 Seventeen, paragraphs B and C, that his intent in doing what he
5 was doing to evade these, in the way he was depositing checks,
6 was for the purpose to thwart the tax collection efforts of the
7 IRS.

8 And before that, when we're looking at the preceding
9 paragraphs, in paragraph 9 we talk specifically about the IRS
10 sending notices to the defendant concerning this, as well as
11 the actions that he took in 10 and 11.

12 THE COURT: Well, that's across a long period of
13 time, right?

14 MS. SOWRAY: It is across a long period of time.

15 THE COURT: Notices of default or whatever else you
16 were sending?

17 MS. SOWRAY: Your Honor, I agree that it is across a
18 good amount of time.

19 THE COURT: I guess my problem is if for years -- for
20 several years, let's say in 2010 you send someone a notice --
21 you, the federal IRS send someone a notice -- then conduct that
22 occurs in 2014, for example, 2013, that would be a tough sell,
23 wouldn't it, to say that was in response to the letter you sent
24 in 2009 or 2010? I mean, if somebody is going to evade you by
25 concealing their assets, waiting three or four years is a tough

1 sell, isn't it?

2 MS. SOWRAY: I can understand the Court's position on
3 that. However, I would point out that we're saying that
4 notices were being sent over quite a long period of time. When
5 something was done by one of the collection agencies, that --

6 THE COURT: You say "one of the collection agencies,"
7 like you're partners, but it is possible, isn't it, for someone
8 to evade state tax collection and not evade federal tax
9 collection?

10 MS. SOWRAY: It is possible under some sets of
11 circumstances.

12 THE COURT: You have to show evasion of federal tax
13 collection here in this case, obviously, under Count 1?

14 MS. SOWRAY: Yes, Your Honor. And we believe that
15 that is -- that those facts are available, will be available in
16 the trial; that when we're looking at --

17 THE COURT: Well, sure, but we aren't talking about
18 that. That will just help you if I dismiss without prejudice.
19 It doesn't help you -- you can't say there are facts not in the
20 indictment that beat a motion to dismiss the indictment. That
21 just doesn't work.

22 MS. SOWRAY: Correct, Your Honor.

23 THE COURT: What you have in the indictment is you
24 sent him notices for quite a period of time, and then you state
25 something about his intent in changing his financial behavior,

1 right?

2 MS. SOWRAY: Yes, Your Honor.

3 THE COURT: All right.

4 MS. SOWRAY: The government believes that there is
5 enough there to show what the defendant would have to be --

6 THE COURT: Well, what did he misrepresent?

7 MS. SOWRAY: I'm sorry?

8 THE COURT: In what way did he misrepresent anything
9 to the IRS? If evasion under persuasive authority is
10 fundamentally some sort of misrepresentation or concealment,
11 then did he ever misrepresent to the IRS anything about what he
12 was doing with his own checks?

13 MS. SOWRAY: No. He was generally pretty clear with
14 the IRS what he was doing and why.

15 THE COURT: Did he ever conceal what he was doing?

16 MS. SOWRAY: I suppose that depends on how -- if you
17 look at concealment as he was putting the checks in and taking
18 them out so they weren't accessible, yes, Your Honor.

19 THE COURT: Right. But, I mean, that would be
20 true -- then concealment would be anybody who just cashes their
21 checks.

22 MS. SOWRAY: But, Your Honor, the difference is that
23 he's doing it for the purpose of thwarting the IRS collection,
24 based on his knowledge of what's going --

25 THE COURT: Why he's doing it is something you have

1 to have a hook to show. You can't show it just by cashing
2 checks, right?

3 MS. SOWRAY: Correct, Your Honor.

4 THE COURT: If you had a tax issue collection with
5 someone, and then once you went to enforce it, get the money
6 from them, you learned, wait a minute, this person never
7 deposits their checks, they just cash them, oh, my gosh, that's
8 a lot harder to collect. Would that be evasion or just harder
9 to collect?

10 MS. SOWRAY: It would depend on what their purpose
11 was.

12 THE COURT: Which would be shown by something more
13 than just merely cashing checks, right? You would need
14 something more.

15 MS. SOWRAY: Yes. And here we have that he was given
16 notice on several occasions, made it clear he did not wish to
17 pay taxes for certain reasons, and then once the actual taking
18 of the money was done by the government, he changed --

19 THE COURT: Which government?

20 MS. SOWRAY: Well, I understand the Court believes
21 because it was --

22 THE COURT: It's two governments, right?

23 MS. SOWRAY: Yes, Your Honor.

24 But I believe what was happening here is that the
25 Court is saying that just because the Department of Revenue was

1 the one to take the money, we must therefore say that that is
2 the only reason why Mr. Bowman changed his behavior, and I
3 don't believe that that is the correct outcome of when we look
4 at all of the information that we have here, Your Honor.

5 THE COURT: I understand that argument. Thank you
6 very much.

7 MS. SOWRAY: Thank you, Your Honor.

8 THE COURT: I understand the argument, and I think
9 it's a serious argument, and it represents a distinction that I
10 think the governing federal statute here makes or allows, at
11 least, and that is that not everything that qualifies as making
12 the collection efforts of the United States more difficult
13 qualifies per se as evasion.

14 So, for example, as I said, someone could say, oh,
15 they're coming down my street. I'm going to start, you know,
16 buying drinks at the bar and rewarding my friends for
17 everything I can think of. And if that's done through lying or
18 misleading or concealment, then yes. But if it just makes
19 collection more difficult, then as I said, there are other
20 problems that creates for the person who does that, but it's
21 not evasion.

22 More particularly for our case, cashing checks by
23 itself is not evasion. It's got to be, in this case, totally
24 related to the timing. Starting to cash checks by itself isn't
25 evasion, but it can be if it happens, and a very rational

1 inference to make in the light most favorable here to the
2 United States, a rational inference to make is, well, it's the
3 taxing authorities stepped up or brand-new enforcement efforts
4 that triggered cashing instead of depositing. And as I said,
5 you've got not just the fundamentally innocuous decision to
6 cash checks on your hands, you've got cashing checks as a means
7 of evasion.

8 But since that's also a little tricky and partakes of
9 this same distinction between conduct that simply makes
10 collection more difficult and conduct that is evasion, I'm
11 unwilling to infer it across sovereigns, and so the only
12 conduct that could reasonably be inferred to give rise to the
13 altered financial behavior of Mr. Bowman here is the stepped-up
14 enforcement efforts of the State of Oregon, and I don't think
15 the indictment can be read fairly to -- other than in a way
16 that's simply conclusory, and therefore invalid under governing
17 law, I don't think the indictment can fairly be read to suggest
18 in any way that the change in financial behavior is triggered
19 by any event done, any new or increased enforcement efforts by
20 the federal government.

21 And since it's the federal government that the Count
22 1 of the indictment charges him with evading, then I think the
23 indictment fails to allege or support a critical element of
24 Count 1.

25 So I grant the motion to dismiss it. I grant it

1 without prejudice to attempt to alter the indictment, without
2 ruling on whether that renewed attempt to do so runs afoul of
3 statute of limitations or otherwise. I just don't dismiss it
4 with prejudice.

5 And you've represented that you think you have facts
6 that would show that, sir. So if you're otherwise free to do
7 so and don't run afoul of other legal issues, then you're free
8 to try to do so.

9 I believe that concludes the legal questions before
10 me this morning.

11 Anything further from the United States?

12 MS. SOWRAY: No, thank you, Your Honor.

13 THE COURT: For the defense?

14 MR. SCHINDLER: No. Thank you, Your Honor.

15 THE COURT: We'll be in recess.

16 MR. SCHINDLER: Thank you.

17 THE CLERK: This court is adjourned.

18 (Proceedings concluded.)
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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

April 12, 2018

BONITA J. SHUMWAY, CSR, RMR, CRR
Official Court Reporter

DATE